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October 29, 1997

**BY FEDERAL EXPRESS**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M. Street, N.W.  
Washington, D.C. 20554

RE: MM Docket No. 97-182

Dear Mr. Caton:

Enclosed please find an original plus nine copies, of the comments of Jefferson Parish in the above captioned proceeding.

Sincerely,

Michael W. Tiff  
For the Firm

MWT/dlk

Enclosures

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
)  
Preemption of the State and Local Zoning and )  
Land Use Restrictions on the Siting, )  
Placement and Construction of Broadcast )  
Station Transmission Facilities )

MM Docket No. 97-182

**COMMENTS OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA**

Jefferson Parish is a Home Rule Charter entity in the Greater New Orleans Metropolitan Statistical Area in the State of Louisiana. Under its Charter, Jefferson Parish is empowered to, and does exercise general police powers and is further empowered to prepare, enact, and enforce comprehensive zoning plans for the development of Jefferson Parish and to adopt, enact, and enforce uniform building and related technical codes.

Jefferson Parish exercises such powers through its Planning Department, its Planning Advisory Board, its Zoning Appeals Board, and ultimately the Parish Council. An applicant for a broadcast transmission facility may apply for a building permit. If the applicant's facility meets the requirements of the building and zoning codes, the permit may issue. If the applicant's facility does not meet the requirements of the building and zoning codes, the applicant may seek a variance through a special permitted use process through the Planning Advisory Board, the Zoning Appeals Board and ultimately the Parish Council. The special permitted use process may take from 60 to 105 days from public notice of the initial hearing on the application.

Jefferson Parish is further empowered under its Charter to provide fire, police and public safety services and to develop, maintain and operate public safety and emergency communication systems. Jefferson Parish provides an emergency and public safety communication system through its Office of Communications and its 911 Communications District. Jefferson Parish's emergency and public safety communication system is used on a daily basis by 50 public service agencies within Jefferson Parish, including its emergency medical districts and its fire and police departments, and those of its incorporated municipalities; and for other emergency management purposes, including flood and hurricane protection measures, environmental emergencies, animal control purposes, drainage, sewerage, and drinking water management services, and health inspection and code enforcement services.

**JEFFERSON PARISH OPPOSES THE PROPOSED RULE HEREIN.**

Jefferson Parish understands that the proposed rule would limit the application of its building and zoning code permit processes for the review of proposed broadcast transmission facility placement and siting to: 1) a 21-day period for existing facility modification; 2) a 30-day period for collocation or relocation within a 300-foot area or height extension; and 3) 45 days for "all other cases," presumably including new facility construction. Any failure to act before these arbitrary and unwarranted deadlines would result in the request being deemed granted.

Jefferson Parish further understands that the proposed rule would preempt its consideration of: 1) the environmental or health effects of radio frequency emissions; 2) interference with consumer electronics and with broadcasters or other telecommunication service providers, presumably including public safety networks; 3) and lighting, marking or painting requirements.

Jefferson Parish further understands that the proposed rule would broadly preempt, in the

Commission's words, "important state and local roles in zoning and land use matters and their longstanding interest in the protection and welfare of their citizenry."<sup>1</sup> That is, the proposed rule would preempt any rule or regulation that impairs the ability of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities unless for a clearly defined and expressly stated health or safety objective.

Further, Jefferson Parish understands that the proposed rule would require that such decisions be rendered in writing, and that such decisions may bypass Jefferson Parish's normal "appellate" procedures in that "any decision" by a local instrumentality may be appealed directly to the Commission for arbitration or declaratory relief, rather than through the Planning Advisory Board, Zoning Appeals Board and ultimately, the Parish Council (and thereafter local courts). Finally, Jefferson Parish understand that the foregoing would apply to all towers, broadcast antennas, associated buildings, and all equipment, cables and hardware used for the purpose of or in connection with federally authorized radio or television broadcast transmissions.<sup>2</sup>

## **GROUND FOR OBJECTION**

### **Proposed Preemption Extreme**

Jefferson Parish objects to the broad and unwarranted preemption of its building and zoning code authority which is presented by the proposed rule. Further, Jefferson Parish object to the all-encompassing definition of "broadcast transmission facilities" which coupled with the proposed preemption, would unacceptably condition and limit Jefferson Parish's building or zoning code

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<sup>1</sup> Notice of Proposed Rulemaking in MM Docket 97-182, at para. 11.

<sup>2</sup> Id. Appendix B, "Petitioners' Proposed Rule.

consideration and review authority, for example, of an “accessory building” to “clearly defined and expressly stated health or safety objectives” and only within a 45-day period.

Under the proposed rule, a broadcaster desiring to build a new television station or studio, may apply for a building permit, which, after the 45-day period contemplated by the proposed rule, would be deemed granted, or assuming denial, seek an arbitration or declaratory relief from the Commission on the grounds that the new station or studio is used in connection with federally authorized radio or television broadcast transmission.

As another example, a broadcaster desiring to deploy cable between a station and a transmitter may apply for right of way use, which, after the 45-day period contemplated by the proposed rule, would be deemed granted, or assuming denial, seek an arbitration or declaratory relief from the Commission on the grounds that the cable link is used in connection with federally authorized radio or television broadcast transmission.

Jefferson Parish further objects to the broad and all-encompassing definition of “broadcast operator” to include any person or form of business organization issued any authority, permit or license by the Commission. Under this definition, a ham radio operator desiring to house his equipment in a new shed, may conceivably seek federal preemption of the application of the building or zoning code to his back yard construction activities. In *Pentel v. City of Mendota Heights*, 13 F. 3d 1261 (8th Cir. 1994) a Court of Appeals reversed and remanded a District Court decision for further review of Mendota’s decision to disapprove the application of a ham radio operator for a 68-foot tower in her backyard. Under the proposed rule, this federal preemption would extend to accessory facilities - hardly a matter of federal concern.

These scenarios, perhaps extreme, perhaps not, obviously conflict with the Commission's stated intent to not unduly interfere with the legitimate affairs of local government when they do not frustrate federal objectives.<sup>3</sup> Moreover, these scenarios represent actions far beyond any expressed, implied or legitimate federal concerns.

### **Local Authority Will Not Inhibit DTV Roll-Out**

Jefferson Parish disagrees with any assessment that its building and zoning codes will unduly inhibit the rapid implementation of digital television (DTV) or that such codes will stand as an obstacle to the institution and improvement of radio and television broadcast service generally.

Jefferson Parish avers that there exists no credible evidence that delays in local zoning and land use decisions would hold up the construction of any essential components of DTV transmission systems, thus making it impossible for licensees to satisfy DTV facility construction requirements.

On the contrary, Jefferson Parish asserts that its requirements establish a date certain by which land use decisions will be made and that the date certain can be factored into DTV facility construction planning and schedules. Jefferson Parish further asserts that it is willing to work with the industry in the consideration of an expedited planning and zoning process, and notes that no local broadcaster has raised any issue with Jefferson Parish's existing planning and zoning procedures.

Jefferson Parish further disagrees with the National Association of Broadcasters' (NAB) assertion that there exists an array of "obstacles" arising from state and local regulation of tower siting and construction, including environmental assessments, fall radius requirements, collocation requirements, marking and lighting requirements and concerns with interference to other electronic

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<sup>3</sup> Notice of Proposed Rule Making in Docket No. MM-97-182, at para. 15.

devices.<sup>4</sup>

As the Commission itself acknowledges:

There are now over 12,000 radio and 1,500 television station licenses outstanding, totals which suggest that generally compliance with state and federal laws relating to broadcast station construction and operation has been possible and that state regulation has not been an insuperable obstacle to the exercise of the Commission's "powers to promote and realize the vast potentialities of radio."<sup>5</sup>

Jefferson Parish further asserts that the Commission has already adequately addressed ~~this~~ the issue, of "obstacles" presented by local building and zoning authority to the rapid deployment of DTV facilities, in its Fifth Report and Order, 62 F.R. 26996 (May 16, 1997), noting "our construction schedule is reasonable," at paragraph 86, and by establishing a process to obtain an extension to the applicable construction deadline. At paragraph 77 of the Fifth Report and Order, the Commission stated:

We will grant an extension to the applicable deadline where a broadcasters has been unable to complete construction due to circumstances that are either unforeseeable or beyond the licensee's control if the licensee has taken all reasonable steps to resolve the problem expeditiously. Such circumstances include, but are not limited to, the inability to construct and place in operation a facility necessary for transmitting DTV, such as a tower, because of delays in obtaining zoning or FAA approvals,<sup>6</sup> or similar constraints . . . Authority is delegated to the Chief of the Mass Media Bureau to grant an extension of time of up to six months beyond the applicable construction deadline, upon demonstration by the DTV licensee or permittee that the standard discussed above is met. . . ( footnote added).

Elsewhere, at paragraph 91 of the Fifth Report and Order, the Commission observed that those broadcasters arguing for a longer construction period based their concerns on hardware supply

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<sup>4</sup>Id. at Para. 4.

<sup>5</sup>Id. at. Para. 16.

<sup>6</sup> Jefferson Parish wonders if the FCC is considering an equivalent to the proposed rule to require the "preemption" of Federal Aviation Authority regulations which may create "obstacles" to the rapid roll-out of DTV.

constraints, insufficient personal resources, or lack of adequate new tower sites.<sup>7</sup> Significantly, these broadcasters did not cite the “obstacles” presented by local building and zoning codes. At paragraph 92 of the Fifth Report and Order the Commission observed that *its limited build out requirements should ease concerns with the construction or upgrades of towers*, stating “One of the most significant issues in converting to digital broadcasting is the construction of new towers or the upgrade of existing towers. As explained above, this burden will be eased by our limited build-out requirement.” At paragraph 100 of the Fifth Report and Order the Commission observes it will review the progress of DTV every two years - suggesting that if the “obstacles” asserted by the NAB actually exist, these “obstacles” can be addressed in the Commission’s biannual review.

#### **“Categorical Preemptions” Swallow Health and Safety Authority**

Jefferson Parish observes that there exists an apparent anomaly presented by the NAB’s objections to environmental assessments, fall radius, marking and lighting requirements and interference with electronic devices and the proposed rule’s single and solitary sufferance of local authority only in instances where a clearly articulated health or safety objective may be asserted. Jefferson Parish avers that these “categorical preemptions”<sup>8</sup> preclude the exercise of the health and safety considerations ostensibly preserved by the proposed rule.

Further, Jefferson Parish observes that the proposed preemption of these concerns would be in apparent contradiction to the Commission’s previously expressed and stated concern that DTV construction may expose the public to dangerous situations and may present hazards to air

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<sup>7</sup> Perhaps the FCC in line with the proposed preemption of local governing authorities, should consider “nationalizing” the needed hardware “impressing” the required personnel or establishing expropriation provisions to secure sites in order to address these “obstacles”.

<sup>8</sup> Id. at para. 8.



navigation. Fifth Report and Order, at para. 75.

Jefferson Parish asserts that environmental assessments, fall radius, marking and lighting requirements and electronic interference concerns *are designed to address health and safety objectives and* that the "categorical preemption" of these concerns effectively precludes the exercise of the proposed rules' ostensible nod to the health and safety objectives of localities. To state the obvious: environmental assessments may address health and safety concerns; fall radius requirements are designed to protect the occupants of building adjacent to broadcast transmission towers from falling towers;<sup>9</sup> marking and lighting requirements may address health and safety concerns which may not be addressed by Federal Aviation Administration concerns;<sup>10</sup> and electronic interference, to the extent it may degrade or disrupt public safety communications, presents obvious health and safety concerns.<sup>11</sup>

***Given the foregoing, and the overly broad and unwarranted preemption presented by the proposed rule Jefferson Parish is at a loss to determine exactly what health and safety objectives it may appropriately address under the proposed rule's ostensible preservation of local health and safety authority.***

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<sup>9</sup>Jefferson Parish requires that broadcast transmission towers must be located at least the same distance away from adjacent structures as the tower is tall. Section 20.2 (d) of the Comprehensive Zoning Ordinance of Jefferson Parish. The recent example of the WLBT television tower collapse in Mississippi underscores this concern.

<sup>10</sup>Jefferson Parish avers that FAA regulations may not address health and safety concerns implicated by low flying aircraft, including helicopters, engaged in crop dusting or mosquito eradication or similar activities. In some instances, low flying aircraft receive FAA waivers to fly below the 200-foot level of FAA-required tower lighting. In hilly or mountainous terrain, the 200-foot level is measured from the base, not median ground level, creating additional hazards.

<sup>11</sup>Jefferson Parish observes that there exists a second anomaly presented by the Commission's stated future objective to distribute among government agencies analog spectrum, returned by broadcasters to the Commission in exchange for digital spectrum, *for public safety purposes*, and the apparent sufferance of the possible interference with existing public safety networks which may occur where the consideration of such interference is preempted.

### **Collocation**

With respect to the NAB's objection to collocation requirements, Jefferson Parish asserts that collocation concerns should be addressed by and within the industry, through the adoption of internal guidelines and standards, rather than through federal preemption. Jefferson Parish observes that the Commission has condoned or even encouraged collocation. As the Commission stated in paragraph 99 of its Fifth Report and Order:

. . . new technology may allow many broadcasters to use existing towers for digital transmission, thus easing the expense of converting to digital equipment. And, due to the introduction of other services, broadcasters who need new towers, will be able to lease space on their new towers to mobile service providers, further lowering the cost of converting.

Jefferson Parish posits that the industry's motivation in seeking preemption of collocation requirements may be driven more by commercial concerns among competing providers than by concerns over meeting the Commission's DTV construction schedule. That is, Jefferson Parish suggests that there may exist a lack of cooperation among providers with respect to collocation issues rather than any impairment of DTV roll-out presented by collocation requirements.

### **RF Preemption**

With respect to the preemption of radio frequency regulation, Jefferson Parish asserts that any such preemption should not preclude the filing or registration with localities of any Commission acknowledgment or certification that a given provider has established with the Commission that its interference effects or radiation levels comply with or meet Commission regulations or standards and that the proposed rule should permit, or require, such filings or registrations with localities or permit a requirement that providers submit radiation level measurements to localities. Similar

requirements apparently exist with respect to cellular communications, given the Commission's ongoing consideration of a rule which would preclude locality-required measurement of cellular antenna radiation as a condition of permitting.<sup>12</sup>

Further Jefferson Parish avers that its existing and certain proposed zoning regulations encourage or may require in the future the collocation of transmission facilities. The multiple collocation of such facilities may result in the increased possibility that combined radiation levels will exceed Commission regulations or standards even though individual providers may meet such regulations or standards. This matter of local concern may be addressed by required certification filings or required provider measurements.

Jefferson Parish further avers that the operation of its emergency and public safety communication network may be degraded or disrupted through interference by excessive radiation levels. Jefferson Parish further avers that without the ability to require of broadcast transmission providers the filing or registration of Commission acknowledgment or certification of compliance with Commission regulations or standards or provider measurements, Jefferson Parish will not be forewarned of or permitted the opportunity to address the potential degradation or disruption of its emergency and public safety communications network.

Jefferson Parish avers that its citizens are concerned with interference and radiation and that the proposed rule undermines Jefferson Parish's exercise of police and zoning power to address those concerns under its Home Rule Charter.

Jefferson Parish further avers that the proposed rule would create a situation in which the

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<sup>12</sup> FCC Dockets WT-97-197, ET No. 93-62 and RM-857. See comments of Jefferson Parish filed therein.

Commission could “second guess” Jefferson Parish determinations by assuming that an otherwise legally acceptable zoning decision was grounded on interference or radiation concerns where the record may reflect that such concerns were raised by citizens, but were not actually made the basis for the decision or determination. Such a situation would act to “chill” the right of citizens and elected officials to raise such concerns.

Jefferson Parish further avers that the proposed rule would place the Commission in an impermissible conflict of issue position, in that the Commission mandate to distribute digital spectrum and to oversee the rapid roll-out of DTV and the proposed rule may result in the Commission’s weakened enforcement of its interference and radiation levels regulations and standards where localities are not permitted to require the filing or registration or Commission acknowledgment or certification of compliance with Commission standards or to itself measure or require provider measurement of interference or radiation levels.

### **Commission Inquiries**

With respect to the Commission’s suggestion that “preemption be limited to the top markets in which the DTV roll-out schedule is more aggressive,”<sup>13</sup> Jefferson Parish restates its strong objection to the proposed preemption with the caveat that if the Commission does adopt such preemption it should be thus limited.

It is fundamentally unfair to impose uniform restrictions on localities, which restrictions are designed to achieve federal objectives, where those objectives may not be met in a uniform manner. In this regard Jefferson Parish notes that it is not one of the top thirty television markets listed by

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<sup>13</sup> Notice of Proposed Rule Making in Docket MM 97-182 at para. 21.

the Commission at footnote 32 of the Notice of Rule Making.

With respect to the Commission's suggestion that localities comment on the possibility of using expedited procedures to assure that the Commission's construction schedule is met, Jefferson Parish believes that the Commission should consider, as an alternative to the proposed preemption, a suggestion that the industry and localities establish expedited procedures to meet Commission objectives in lieu of the broad and unwarranted preemption and direct appeal to the Commission contemplated by the proposed rule.

Further, the Commission should consider as an example the model presented by the Telecommunications Act's (the Act) treatment of personal wireless service facilities. The Act in fact affirmatively states (under the heading Preservation of Local Zoning Authority):

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless communication facilities.

As the Commission itself sets forth in footnotes 7 and 8 of the Notice of Rule Making, the Act does not contemplate "categorical preemption," but instead articulates a requirement that permit denial be supported by "substantial evidence." Further, the Act permits an appeal to the Commission only after "a final action or failure of a state or locality, rather than an appeal to the Commission after "any decision by a state or local government".

In contrast, the NAB-proposed rule preempt any local considerations save "health and safety" concerns, which consideration is effectively eliminated by the "categorical preemptions" requested by the industry. Also, the direct appeal to the Commission proposed after "any" local decision is an obvious attempt by the NAB to circumvent the normal "appellate" processes envisioned by local

government zoning procedures. In Jefferson Parish's case, an applicant may apply to the Planning Advisory Board or Zoning Appeals Board for a special permitted use after any building permit denial. An applicant may then appeal any denial by same to the Parish Council.

In its treatment of the wireless personal communications industry, the Act requires only that a locality's decision be supported by substantial evidence, without any limitations or "categorical preemption."

The Act also contemplates the exhaustion of local remedies by disaffected personal wireless communication providers prior to an appeal to the Commission. The proposed preemption on the other hand permits a direct appeal to the FCC.

As the Commission is aware, the wireless industry raised concerns similar to those of the DTV industry. However, in adopting the Act, Congress dismissed those concerns, despite its articulated goal of encouraging the deployment of advanced telecommunication services, including digital telephony. The digital television industry has not demonstrated any need to be accorded greater rights than those accorded the digital telephony industry. Accordingly, the FCC should not supplant its judgement for that of Congress.

Moreover, the Act's preservation of local zoning authority has not impaired the development of the wireless personal communications industry. In fact, in interpreting the Act, the Courts have recognized the rights of localities to take up to six months to gather information, to process wireless tower siting applications, and to study and deliberate in the siting of digital telephone tower, see e.g. *Sprint Spectrum vs. City of Medina*, 924 F. Supp. 1036 (USDC, Washington 1996), upholding right of municipality to institute a six month moratorium on tower siting.

## **Preemption Unwarranted**

Preemption should only occur where necessary.

As the Commission itself notes:

. . . we have authority to preempt where state and local law, among other things, stands as an obstacle to the accomplishment and execution of the full objectives of Congress or where we find preemption is necessary to achieve [our] purposes within the scope of our delegated authority.<sup>14</sup>

The Commission has held back where preemption is not justified.

In its Report and Order in *In the Matter of Telecommunications Services Inside Wiring*, CS Docket No. 95-184, the Commission decided not to preempt state and local mandatory access laws to inside home cable wiring, deciding instead to encourage local jurisdictions to establish laws and circumstances to insure Commission objectives. Likewise here, the Commission may decline the broad and unwarranted preemption proposed by the industry and instead encourage or suggest that localities develop procedures designed to foster the development of the DTV industry while at the same time preserving local autonomy.

Quite simply, the broad preemption presented by the proposed rule is unnecessary. Local governments can, and in the past, have accommodated new industry while responsibly exercising land use and zoning authority.

## **Conclusion**

Congress and the courts have long recognized that zoning is a matter of local concern. The proposed preemption effectively sets up the Commission as a de facto federal zoning board, without the requisite expertise or knowledge of local conditions. This usurpation of local authority is

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<sup>14</sup> Id. at para. 12.

unacceptable. The overbroad definitions of “broadcast transmission facility” and “broadcast operator” further compound the problem by creating the possibility of preemption of local decisions which in no way affect federal objectives.

The “categorical preemption” proposed is overly broad and “swallows” the ostensible preservation of health and safety authority, leaving localities with no jurisdiction at all.

There exists far less intrusive means to address the Commission’s objectives. The Telecommunication Acts treatment of the wireless communication industry is a working example. The cooperation between that industry and localities encouraged by the Act is far preferable to the hostility which will engendered when the DTV industry invades hometowns armed with federal authority to come and go as it pleases.

For these reasons, Jefferson Parish urges the Commission to reject the NAB’s proposed rule and to work to achieve a consensus among localities and the DTV industry on how to achieve commission and industry objectives without the broad and unwarranted preemption now proposed.

Respectfully submitted,



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